



POLICE DEPARTMENT

The
City
of
New York

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In the Matter of the Disciplinary Proceedings :

- against - : FINAL

Police Officer Javier Montalvo : ORDER

Tax Registry No. 942230 : OF

Housing Borough Manhattan : DISMISSAL

-----X

Police Officer Javier Montalvo, Tax Registry No. 942230, Shield No. 23055, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 84703/08 as set forth on P.D. 468-121, dated November 5, 2008, and 84721/08, as set forth on form P.D. 468-121, dated October 29, 2008, and after a review of the entire record, has been found Guilty of the sole specification in Disciplinary Case No. 84703/08, to which he pled Guilty; found Not Guilty of Specification Nos. 1, 3, 4, 5 and 7 of Disciplinary Case No. 84721/08; and found Guilty of Specification Nos. 2 and 6 of Disciplinary Case No. 84721/08.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Javier Montalvo from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On February 01, 2011 @ 0001Hrs.



POLICE DEPARTMENT

August 25, 2010

In the Matter of the Charges and Specifications : Case Nos. 84703/08 &
84721/08

- against - :

Police Officer Javier Montalvo :

Tax Registry No. 942230 :

Housing Borough Manhattan :

At: Police Headquarters
 One Police Plaza
 New York, New York 10038

Before: Honorable Martin G. Karopkin
 Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: David Green, Esq.
 Department Advocate's Office
 One Police Plaza
 New York, New York 10038

For the Respondent: John P. Tynan, Esq.
 Worth, Longworth & London, LLP
 111 John Street – Suite 640
 New York, New York 10038

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on July 20, 2010 charged with the following

Disciplinary Case No 84703/08

1 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about April 22, 2008, while off-duty near said Police Officer's residence in [REDACTED] County, New York, wrongfully did make and display an unauthorized color photocopy of his New York City Police Department Identification Card (PD416-091) on the dashboard of his parked personal automobile (*As amended*)

PG 203-10, Page 1, Paragraph 18 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

Disciplinary Case No 84721/08

1 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer grabbed an individual known to the Department by the front of her shirt, ripped the shirt open, pulled said individual's hair, struck said individual with a closed fist about her arms, and pushed said individual, causing her to fall to the floor and suffer injury and substantial pain

PG 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

NYS Penal Law Section - 240 26(1) – "Harassment in the second degree"

NYS Penal Law Section - 120 00(1) – "Assault in the third degree"

2 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer pushed an individual known to the Department, causing said individual to fall onto a sofa, and then placed both of his hands around said individual's neck and squeezed while yelling "I prefer you dead!", causing said individual to choke for one to two minutes, and to suffer injury and substantial pain

PG 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

NYS Penal Law Section - 240 26(1) – "Harassment in the second degree"

NYS Penal Law Section - 120 00(1) – "Assault in the third degree"

3 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that, having struck and choked an individual known to the Department, and upon said individual attempting to call 9-1-1 with her cellular telephone, did grab said individual's cellular telephone without permission or authority, and broke it, causing it to become inoperable

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS
N Y S Penal Law Section - 145 00(1) – “Criminal mischief in the fourth degree”

4 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer, having engaged in a physical dispute with an individual known to the Department, did fail to safeguard his firearm by pulling said firearm from a holster at his waist, and did struggle with said individual, causing said firearm to discharge one round, and did yell at said individual, “I don't care! I'm going to kill you!” causing said individual to fear for her physical safety

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS
P G 204-08, Page 2, Paragraph 7 – FIREARMS – GENERAL REGULATIONS
UNIFORMS AND EQUIPMENT
N Y S Penal Law Section - 120 25 – “Reckless endangerment in the first degree”
N Y S Penal Law Section - 265 35(3)(a) – “Prohibited use of weapons”
N Y S Penal Law Section - 120 14(1) – “Menacing in the second degree”

5 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED], New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer, having engaged in a physical dispute with an individual known to the Department, did pull said individual's hands behind her back and handcuff her, push her onto a sofa, and kept said individual restrained on said sofa for a period of approximately two hours, pushing her down and tightening said handcuffs when said individual attempted to get up and leave said location

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS
N Y S Penal Law Section - 135 05 – “Unlawful imprisonment in the second degree”

6 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about August 31, 2008, at about 0200 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, having been involved in an unusual occurrence, a physical dispute with an individual known to the Department, which resulted in a discharge of said Police Officer's firearm, did fail and neglect to notify the patrol supervisor, precinct of occurrence, or to safeguard the scene, as required

P G 212-32, Page 1, Paragraph 2 – OFF DUTY INCIDENTS INVOLVING UNIFORMED MEMBERS OF THE SERVICE – COMMAND OPERATIONS

P G 212-29, Page 2, Paragraph 1 – FIREARMS DISCHARGE BY UNIFORMED MEMBERS OF THE SERVICE – COMMAND OPERATIONS

7 Said Police Officer Javier Montalvo, while assigned to the 44th Precinct, on or about October 23, 2008, at about 2000 hours, while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, wrongfully did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer engaged in a dispute with an individual known to the Department, during which said Police Officer forcibly pulled her out of her bed, forced her to sleep in another room at said location, and wrongfully took said individual's keys to the apartment

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

The Department was represented by David Green, Esq., Department Advocate's Office, and the Respondent was represented by John P. Tynan, Esq.

The Respondent, through his counsel, pleaded Guilty to the sole specification in Disciplinary Case No. 84703/08 and entered a plea of Not Guilty to the subject charges in Disciplinary Case No. 84721/08. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Disciplinary Case No. 84703/08 the Respondent having pleaded Guilty is found Guilty of the one specification in that case

In Disciplinary Case No. 84721/08 the Respondent is found Not Guilty of Specification Nos 1, 3, 4, 5 and 7 The Respondent is found Guilty of Specification Nos 2 and 6

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Marlene Valentine, Sergeant Ronald Prestia, and Sergeant Thomas Bruen as witnesses The Department also put in evidence a tape and transcript of an interview of Marnez Tomassini conducted on October 26, 2008

Marlene Valentine

Valentine is aunt of the Respondent as her sister is his mother She believes that the Respondent's wife, [REDACTED], from whom he is getting a divorce, is in [REDACTED] The Respondent and [REDACTED] have three daughters Valentine recalled a barbecue in the summer of 2008, she was not sure if it was the Fourth of July or her birthday which is [REDACTED] She remembered that it was a family gathering and [REDACTED], who worked at Dunkin' Donuts, offered to bring a cake Valentine testified, "They got there evening hours, late, with the cake, of course, and then she was kind of upset, and we weren't able to speak that much at that time "

In the kitchen, [REDACTED] showed her some marks on her neck Valentine was asked to demonstrate and she took both hands and put them to the sides of her neck demonstrating a choking position She also saw scratches on the Respondent's face and she knew they had been fighting

Valentine said the Respondent and [REDACTED] did not stay long and that she had wanted to show her the marks on her neck Valentine told [REDACTED] to call her back after the Respondent went to work She did not call back that day or the next and on Monday she was able to reach [REDACTED] at work [REDACTED] told her that her cell phone had been destroyed When asked if [REDACTED] explained how the cell phone was destroyed, Valentine answered "Well, she said once they got back home they got into a verbal conflict, and this escalated into both of them hitting each other and physically, having physical, you know, fights "

On Monday, when she and [REDACTED] discussed what happened she explained that they both went at it Valentine said that [REDACTED] told her the incident started when [REDACTED] saw some text messages from one of the Respondent's female co-workers with whom [REDACTED] thought the Respondent was having an affair Valentine then testified

She said that is when she approached him, she slapped him and that is when he grabbed her on the neck When he grabbed her, he lost it, and then they both fell on the dining room area. And she was on the floor trying to grasp for air, she felt like she was losing

She said she was trying to grasp for air She couldn't breathe That's when she went and reached for his gun Okay That's when she pulled out the gun and made the shot After she did the shooting, that's when he kind of came back to himself and let her loose That's what she told me based on the statement

Valentine testified that at the party the Respondent had told her son that he had gotten the scratches on his face while making an arrest to avoid embarrassment [REDACTED], Valentine said, did not explain exactly where or how she got the gun but the gunshot did make the Respondent let go of her hair

Valentine said she did not discuss the matter with the Respondent because she believed that [REDACTED] was confiding in her

On cross-examination Valentine said that [REDACTED] said nothing about her having been drinking. She did not call the police nor did she advise [REDACTED] to call the police.

Explaining what she knew about the gunshot Valentine testified

Definitely she told me she was the one who fired the gun. That's when he was able to release her. He came to himself and understood that what he was doing was wrong and released her.

When asked who she fired the shot at Valentine answered

She just said she made the hole in the wall, but didn't tell me exactly what she meant to hit. She just told me she pulled out the gun and make the shot.

Sergeant Ronald Prestia

Prestia is a twenty-year member of the Department. He is a domestic violence sergeant at the 49 Precinct and has received special training in domestic violence. On October 26, 2008, he was doing a 4 to 12 tour as the desk officer when he saw a female Hispanic enter the precinct with three children. Officer Tenor, the assistant desk officer, took her into the muster room and then came out and said that he should speak to her. He learned that her name was [REDACTED]. Prestia testified

First she was telling me that she had a dispute with her husband who was a police officer that she wanted to get back into the apartment, that he had locked her out. She had gone to the gym where he was working out, and basically he told her she had to wait until he was done before he would let her back into the apartment.

She then started to tell me about an incident that happened several months prior in which she had an argument with her husband, and that he had hit her and handcuffed her and put her in a chair and took out his firearm and fired a shot into the wall.

Prestia notified the Internal Affairs Bureau, the duty captain, and Sergeant Bruen. Prestia did not have any problem understanding [REDACTED], who spoke with an accent but understood English, although she did not know the word for handcuffs. She was upset but not hysterical.

On cross-examination, he noted that he was not the Respondent's arresting officer. When he indicated that he did not know if [REDACTED] was cooperative with the district attorney's office, the Department stipulated that she was not cooperative and that as a result the criminal charges against the Respondent were dismissed.

Prestia did not observe any injuries on [REDACTED] and noted that the children were upset. He said they spoke for about 20 minutes in the muster room and that the children were present. He did not tape record this conversation or take notes.

Sergeant Thomas Bruen

Bruen, a 29 year veteran, was the Patrol Supervisor on October 26, 2008. He received a call from the assistant desk officer, Tenore. He was told there was a female in the precinct who was married to a police officer and that there had been a domestic dispute. He returned to the precinct, had a conversation with Prestia, and then interviewed the female. He made sure the notifications were made and later participated in an interview of the female. He was told to go to the apartment to observe if there was a bullet hole, and bring the Respondent back to the precinct. He went to the apartment where he met the Respondent. He took the Respondent's gun, shield and ID. He then observed a bullet hole in the wall a little above the left side of the couch. As they were leaving, he assigned Officer Lagaris to stay and he explained that he needed Crime Scene Unit at the location to recover the bullet.

Outside the apartment, he told the Respondent that his wife had made an allegation that he had fired the weapon. He said he did not do it. He said that she did it and, holding his cell phone in the air, he said he had proof. Bruen did not know what the officer meant by this.

Interview of [REDACTED] October 26, 2008

[REDACTED] was interviewed by investigators on the above date. A tape and transcript of that interview was entered into evidence (Department's Exhibit [DX] 1A and 1B). During the interview, [REDACTED] provided the following information:

She has been married to the Respondent for 11 years. They have three children. She made a complaint on October 26, 2008 at the precinct at about 4:00 pm. She said there was "verbal fighting" the day before when they were supposed to go to his aunt, Marlene Valentine's house. She took a cab to Valentine's house.

She called him to pick her up because it was raining but he did not answer the phone. Valentine brought her back to the house and it was locked. She explained that there are two locks and she only has the key for one of the locks. She said she knew the Respondent closed it on purpose to keep her out because he didn't let her in sometimes.

She said she had gotten a key to the second lock and three days earlier he came home, found her in bed and grabbed her out of the bed. She said when he found her he knew she had the key. She said this incident happened "at night" giving the time as "maybe 8:00". She said he found the key and then threw her clothes on the floor and forced her out of the bedroom. She went to sleep with her daughters. She also went to a [REDACTED] lawyer who told her to be calm and not to fight with him. She said she argued with him every day.

She said that back in May or June he told her to get out of the house and at that time he broke "all her stuff"

She said that on Thursday (three days before) he had thrown her and their daughters out of the house

Going back to the date in question, she said she was locked out so she went to a gym she knows that he goes to At the gym, she found him and asked him to give her the key to the house and he told her "no" He said she and her daughters would have to wait until he was ready to go home She left and went to the police station because she said she had enough and she was scared of him because he had hit her in the past She said the Respondent told her the police would do nothing

She remembered an incident that happened around the end of August She knew that was the time because her daughters were away in [REDACTED] and she was alone in the house She had been fighting with him because he "never comes home" She said the incident started earlier in the day at about 5:00 pm when he went to work He said that he had not called her because he had arrested someone and she said that was not an explanation She got mad and left the house She said she went to her job and "many places" returning home at 2:00 am She said he got home early and was there before her When she tried to open the door, he grabbed her and pulled her clothes near her chest area She had a white shirt which he ripped He started pushing and punching her, and she hit him back

She did not know if he was drunk She said she does not drink too much She said he hit her all over her body He grabbed her neck and was squeezing She tried to call 911 and he broke her cell phone

He choked her so hard that she could not breathe and he got scared because she was coughing He threw her on the floor and opened her mouth She got up and grabbed him again because she was "so mad "

She stated he said he didn't care I'm going to kill you She didn't remember if it was at that moment that he pulled the gun "He didn't put in my face, nothing like that "

She said he got the gun from his holster on his belt She said she was scared, they were fighting, she was on the sofa, "and that is how, I don't know, something happened that a shot comes out I didn't know it was so hard " The bullet went into the wall She said this happened while they were fighting She denied ever being in possession of the gun. She said she was in contact with him physically when the gun went off

She said he handcuffed her and then started hitting her again in the back with his hand She said he claimed he was going to tell "them" that she tried to kill him She said he was on his police officer's radio, which she heard as he spoke to someone She said he had two of them in the house¹

She said he told her he called the cops and that he told them she had tried to kill him She knew he talked with a friend She said she heard him tell someone that his wife tried to kill him and that she shot the gun She was screaming that he was a liar

She said someone knocked on the door sometime later and he threw her in the bedroom and told her to go to sleep She was still handcuffed He told her that they were going to come and arrest her and that they needed a captain to come He said "let's see who they are going to believe " She said after he put her in the bedroom he turned on the air conditioner He told her to go to bed, and he went to sleep too Recounting the story she said she had been sitting on the sofa when he put her in the bedroom She was in the

¹ This apparently was later identified as a police scanner

bedroom when the person came to the door She said he never opened the door

At some point he said he was sorry and that he had to go to the precinct because he had called about the shooting She stayed in the house She did not try again to call 911, nor did she tell anyone about the incident.

The next day they went to his aunt's (Valentine's) house for the barbecue When they went to her house, Valentine asked her what the Respondent had done to her She said that Valentine asked because she was crying and she could see the red marks

She described the marks as red lines [REDACTED] said she told Valentine they were fighting and that the Respondent was saying that she shot the gun Valentine, she said, asked her "Why you let the guy do that?"

When they left the barbecue they went home There have been no fights like that since She did not seek medical treatment She said she wanted to go to counseling but he told her he took her out of his plan She said that there were marks from the handcuffs and it hurt for three days

She works at Dunkin' Donuts She said no one noticed her marks at work because she put on a lot of make-up

She did not think the Respondent knew that she had told Valentine and Valentine's son about what happened She said the Respondent was mad at Valentine because she took her to the house

At a later point in the interview, she said that at the time of the gunshot they were fighting She was lying on the sofa and he was on top of her She also mentioned that she had gone to what apparently is a [REDACTED], [REDACTED]
[REDACTED]

The Respondent's Case

The Respondent testified in his own behalf

The Respondent

The Respondent was appointed to the Department on July 10, 2006 After the Academy, he was assigned to the 44 Precinct in the Bronx His wife is [REDACTED]

[REDACTED] They are still married and in the process of getting a [REDACTED] She currently lives in [REDACTED] They have three daughters ages [REDACTED] They have been married for about 11 years He is 33 years old and his wife is [REDACTED]

On August 31, 2008 he was assigned to the 44 Precinct assigned to an 8 35 p m by 4 00 a m tour He arrived home at about 2 00 a m No one was home The children were in [REDACTED] on vacation He waited up for his wife who arrived home at 4 30 a m in an intoxicated state She took about five minutes trying to open the door to the apartment so he got up and opened it As soon as he opened it he smelled alcohol He asked her where she had been and she told him that he goes out with his friends She said she had been out with her friends drinking.

When she came into the apartment, the Respondent stated, she started pushing him and scratching him on the neck His firearm was on top of a counter in the living room When she started scratching him he was in the hallway near the door and he was moving backwards towards the living room

The Respondent said he grabbed her in the bicep/triceps area to try to pull her off of him and he placed her on the living room sofa He said he then grabbed the controller for his Play Station and ignored her

The Respondent noted that the police have never responded to his home for a domestic incident

While they were sitting on the couch she was complaining, he said, that she did not want to be with him anymore. He told her that the door is six feet high and three feet wide and that she could leave. At that point, he testified, she started looking through his wallet.

The Respondent testified that at that point she grabbed his firearm and stated that she was "tired of this shit." He said she aimed at the wall and fired. He acknowledged that the firearm had not been in its holster.

After the shot was fired, the Respondent stated that he stood up and grabbed her in the shoulder, bicep/triceps area and started to bring her to the bedroom. He said he was trying to get her as far away from the gun as possible.

The Respondent testified that his handcuffs were in his book bag but denied restraining her with the handcuffs. He said he placed no restraints on her while she was in the bedroom. He said he started to call his partner to tell him that he got into a verbal altercation with his wife. That call lasted a minute. He said he was planning on telling him about the discharge but did not as he did not want to get his partner involved.

The Respondent acknowledged that he did not call the Operations Unit, the 49 Precinct, or his command to let them know about the discharge. He did not make these notifications, he said, because he did not want his wife, the mother of his children, to be arrested.

During this time, his wife was in the bedroom. She was crying and saying that she did not care who he called. The Respondent testified that he went back to her and

lied, telling her he had already called the 49 Precinct and that they were on the way to get her. She said she did not care. The Respondent described her as "intoxicated, she could hardly move."

He said it was now about 5:30 a.m. He had made an arrest the night before and had to go to the district attorney's office, which is why he was home early. He lay down next to his wife. She was asleep and he tried to fall asleep. At about 7:00 a.m., he was up and went to the 44 Precinct. When he left she was lying in bed, awake.

After he finished his tour on August 31, 2008 he returned home. After taking a shower they went to the party at his aunt's house. They stayed at the party approximately five minutes.

Between that date and October 23, 2008, there were no further problems with his wife. He did not notify his command about the discharge of his firearm.

On October 28, 2008² at 3:00 p.m. [REDACTED] had still not arrived home from his aunt's house. He had gotten home from his regular tour at 4:00 a.m. and she was not home, she had stayed over at his aunt's house. He waited until 3:00 p.m. for her to arrive. When she did not, he decided to go to the gym. A short time after he got to the gym, she arrived and asked for the keys. She had said that she had lost her keys. He said that he was concerned that if he gave her his keys "then I am the one who is going to stay out because our relationship was already – we were arguing."

When he told her he was not going to give her his keys, she informed him that she was going to the 49 Precinct to make an allegation that he did want to give her the keys. He said he told her to "go right ahead." He said his name is on the apartment lease.

² This is what the Respondent said as reflected in the transcript. He meant October 26, 2008.

Because he could no longer concentrate at the gym, he went home. An hour or so later he received a call from the 44 Precinct indicating that they were looking for him. He was told that his wife was at the 49 Precinct making allegations and that he was to stay at his house. He was there for about five or six hours until a sergeant and a police officer arrived.

They asked for his firearm, shield and ID. When they stepped outside they informed him of the more serious allegations. They said his wife had reported that he had fired his weapon.

At about 2:30 a.m. he was arrested. His wife did not cooperate with the district attorney and the criminal case was eventually dismissed. There are no current legal proceedings in which his wife is making allegations against him.

At the time of the incident, he did not have a parking plaque. He said he used a copy of his identification and placed it on the dashboard. This was not approved by the Integrity Control Officer of his command. The Respondent agreed that this was a violation of the Patrol Guide.

The Respondent then acknowledged that he did make an unauthorized color photocopy of his Department ID card and displayed it on the dashboard of his personal vehicle.

On cross-examination, the Respondent did not agree that he and [REDACTED] had a [REDACTED] before the incident and said that they had had a pretty good relationship. He denied taking the key to one of the locks on the apartment door from [REDACTED]. He agreed that she came to the gym on October 26th with the children.

At the time of the incident, his daughters were [REDACTED] years of age and the Respondent agreed that they too were locked out of the apartment. He said he told [REDACTED] to wait in the car. He agreed that this was because he did not want to give her his personal keys. He was concerned, he said, that she would lock him out.

He did not try to stop [REDACTED] from going to the precinct nor did he call the precinct

The Respondent agreed that when he was taken out of his apartment on October 26, 2008, he held up his cell phone as proof that she had fired the shot. He said he had photographs of the bullet hole on his cell phone. The Respondent agreed that these pictures did not prove who fired the shot.

He said that on August 31, 2008 he had come home from work early, at about 2:00 a.m. His wife was not home and he did not go to sleep. He tried to call her on her cell phone but she did not answer. He agreed that at that point in the relationship they argued frequently. When asked if he

responded "Every husband would." He denied wanting to confront her, just ask her about her whereabouts. He had to report to his next tour of duty at 7:00 a.m.

On that day, the Respondent testified, [REDACTED] was trying to open the door with her own keys. He agreed that before she came in the door he removed his gun from its holster and put it on a counter in the living room. It was not covered in any way.

The Respondent indicated that when she came in, he spoke first asking her where she had been. He agreed that she appeared intoxicated. He agreed they had an argument and that the gun was on the counter when this occurred.

He agreed that the argument moved into the living room. He was five to six feet from the gun, and she was also five to six feet from the gun. She sat down on the couch and was about three feet from the gun, closer to the gun than he was. He said he continued to play his video games while sitting on the other side of the sofa. He was about two feet further away from the gun than she was.

He agreed that his wife was angry and drunk and that he left his loaded firearm three feet away from her. He also said he was paying attention to her, "But not in the kind of sense that she is going to grab my firearm." He said he did not expect her to do that.

As soon as she grabbed the gun, he got up and as soon as he got up she shot the firearm. She did not point the gun at him, she pointed it toward the wall. After she shot the weapon, he grabbed her and put the gun in his holster. He kept it in his holster until he decided to put it in a drawer before he lay down. He said he pushed [REDACTED] into the bedroom. The Respondent testified that he keeps his handcuffs with him all the time and he had them in the house at that time. He denied handcuffing [REDACTED]. He said that she is 120 pounds and he was 250 pounds at that time and he did not need handcuffs to "apprehend" her.

He agreed that the bedroom has a door but no lock. He denied closing the bedroom door and that the door was open. He did not go back to playing video games, and he called his partner. He did not mention the firearm discharge in the conversation with his partner. He simply said he was attacked by his wife. The Respondent stated that at the time of the phone call, his wife was in the bedroom crying. She was saying something while she was crying.

He also said he was not really paying attention to her "If she was saying something," the Respondent testified, "I could not comprehend or hear it "

The Respondent acknowledged he had a police scanner he bought on eBay and he had it on. He spoke to his partner for about a minute then he put on the police scanner. He was listening to see if anyone reported the gunshot "If they had reported it, I had no other option but to inform it" the Respondent said. He agreed that he had no plan to report it unless he had to. He reiterated that he did not want his wife, the mother of his children, arrested. He listened to the scanner, he said, all night.

The Respondent testified that before going to bed, he put the gun in his night stand drawer. He agreed the drawer is not locked. He put the magazines under his pillow.

He was asked again what his wife had been saying and he repeated that she said she just did not care that he had, as he falsely told her, called the precinct.

He got up at around 5:30 a.m. and he did not have any conversation with [REDACTED] at that time. When asked if he told her what to do or say if anyone asked her about the gun being discharged he answered, "At that time, no." When asked if, at any point, he told her what to say, the Respondent stated:

As soon as I went to the command, I was changing downstairs in the locker room. At this point, I was contemplating reporting the discharges the day before, so I called her on her cell phone, which I said if anybody comes to the house, you know you discharged the weapon, so they are going to test your hand. While I was taking a shower, you went to put the gun in my drawer, and it went off.

He also told her they would test her hands for gunpowder residue. The Respondent acknowledged that he did not report the firearm discharge. He agreed that this was a conscious decision on his part.

On questioning by the Court, the Respondent stated that the purpose of using the police scanner was to see if any of the neighbors reported a shooting. He noted that if they had he would have had to report it. He again stated that in the morning he called his wife and told her to say that there had been an accidental shooting. That she should say that while he was in the shower she went to move the gun in the drawer and it went off accidentally. He said he told her they were going to find out she was the shooter when they "verify your hands."

FINDINGS AND ANALYSIS

Disciplinary Case No. 84703/08

The single specification in this case charges that the Respondent parked his vehicle near his residence in the [REDACTED] and displayed an unauthorized color photocopy of his New York City Police Department Identification Card (PD416-091) on the dashboard of his personal automobile. The Respondent pled guilty to this charge.

Disciplinary Case No. 84721/08

This case arises from an incident that is alleged to have occurred between the Respondent and his wife, [REDACTED], on or about August 31, 2008. There is no question that the Respondent's firearm was fired into the wall of the apartment shared at that time by the two of them. The difference between the Department's version and the Respondent's version has to do with who fired the gun and what the surrounding circumstances were.

The Department claims that the Respondent physically assaulted his wife, [REDACTED], fired the gun, and then engaged in other misconduct including breaking her cell phone to keep her from calling for help, handcuffing her and locking her in the bedroom. The Respondent claims following a physical assault launched by [REDACTED] against him, she grabbed his gun from a counter where he had left it and fired the weapon, discharging a bullet into the wall. He denies assaulting her or handcuffing her.

[REDACTED] did not testify at this proceeding. The Department offered her hearsay statements made during an interview with investigators on the day she reported these matters. It also offered the testimony of Valentine who is the Respondent's aunt.

Valentine testified that there was a barbecue at her house. The Respondent and [REDACTED] were there. She saw red marks on [REDACTED]'s neck. [REDACTED] also told Valentine that she fired the Respondent's handgun.

The only problem with Valentine's testimony is the dates she gives for this barbecue. She said it was either a Fourth of July celebration or a celebration of her birthday which is at the beginning of August.

Both the Respondent and [REDACTED] place the incident with the gun at the end of August. The Respondent claims to know the specific date to be August 31, 2008 and

[REDACTED] said she knew it was the end of August because the children were away in

[REDACTED] Both the Respondent and [REDACTED] agree that the barbecue at Valentine's home occurred after the gun incident. The Respondent said the gun incident happened early in the morning of August 31st and the party was later that same day in the late afternoon.

The only conclusion that can be drawn is that Valentine is wrong as to the date There is, however, no reason not to accept the remainder of her testimony

As noted previously, [REDACTED] did not testify and evidence of what she said about the events of August 31, 2008 is hearsay Further, [REDACTED] was not subject to any kind of cross-examination where her story could be challenged While hearsay is admissible in this proceeding, this Court has held, on numerous occasions, that uncorroborated hearsay is not substantial evidence and cannot, standing alone, be the basis for a finding of guilt The Department claims that Valentine's testimony provides corroboration of [REDACTED]'s version of events

This Court agrees, in part, with the Department's assertion Valentine described red marks on [REDACTED]'s neck and, during her testimony, she demonstrated what the marks looked like and where they were by putting both her hands on the sides of her neck, giving an appearance of someone being choked

Valentine's observations of [REDACTED]'s appearance does corroborate [REDACTED]'s claim that she was choked It does not corroborate her other claims

The clearest example of this is in regard to the issue who fired the gun In her statement to investigators, [REDACTED] claimed she fought back after the Respondent started assaulting her It is certainly conceivable that during the struggle she picked up his gun and fired it as the Respondent claims There is nothing in the existence of red marks on her neck that contradicts that possibility

On the issue of who fired the gun, we are still left basically with a "he said - she said" situation The Department has argued that the Respondent's version of how the gun was grabbed by [REDACTED] does not make sense and is therefore a fabrication The

Department argues that it is unlikely that the Respondent, who was in the midst of a quarrel with [REDACTED], would let her be in a position closer to his gun than he was, as the Respondent claims. It may not make sense but one could argue that the whole incident did not make sense and that when people engage in that kind of behavior logic goes out the window. In any event the Department's argument, in the view of this Court, is insufficient to corroborate the hearsay testimony of [REDACTED] that the Respondent fired the gun.

This Court also notes that there is clearly something wrong with the Respondent's version of events in that he does not mention the choking incident although there is substantial evidence that he did choke [REDACTED]. But that does not tell us exactly what part or parts of his story he is being untruthful about. Further there is insufficient basis to reject his entire story given [REDACTED]'s admission to Valentine that she fired the gun.

The Department has argued that this statement was made under the influence of the Respondent but Valentine said the statement was made to her in private. Further it contained specific details that differ from the Respondent's version. Valentine said that

[REDACTED] told her she fired the weapon to stop the Respondent from choking her. It should also be remembered that this statement by [REDACTED] is a statement against penal interest which is an exception to the hearsay rule based on the potential reliability of such statements. [REDACTED]'s admission to Valentine that she fired the weapon cannot and should not be easily dismissed notwithstanding her later claim that the Respondent fired the weapon.

In short, there is no inherent reason to accept one version in its entirety over the other and thus this Court can accept as true only those things which are corroborated. The

injury to [REDACTED]'s neck is ample corroboration of her claim that she was choked by the Respondent

Specification No 1

This specification charges that the Respondent grabbed [REDACTED] by the front of her shirt, ripped the shirt open, pulled her hair, struck her with a closed fist on her arms, and pushed her, causing her to fall to the floor and suffer injury and substantial pain

The evidence regarding this alleged event comes from her interview with investigators on October 26, 2008 (DX 1A & 1B) This Court has reviewed the transcript (DX 1B) and listened to the tape of the interview (DX 1A) The Court notes that the tape was very low in volume and sometimes difficult to hear with many inaudible portions This may explain the somewhat disjointed nature of the transcript

[REDACTED] did claim that when she was about to enter the apartment at 2 00 a m the Respondent pulled her in, ripped her shirt, which she remembered was white, and struck her about the body The Court could not find anything about pulling her hair or throwing her to the floor in her statement to investigators but she did indicate that they were engaged in a physical altercation at that point

The investigators asked her if she still had the shirt, which she claimed had blood on it, but she said she threw it away There is no corroboration of this allegation and the only proof is the hearsay statement of [REDACTED] As a result the Respondent is found Not Guilty of Specification No 1

Specification No 2

The second specification alleges that at about 2:00 a.m., while off-duty, in or about Respondent's residence, located in [REDACTED] County, New York, he pushed [REDACTED] causing her to fall onto a sofa, and then placed both of his hands around her neck and squeezed while yelling "I prefer you dead!", causing said individual to choke for one to two minutes, and to suffer injury and substantial pain.

This testimony is audible on the tape regarding this incident. It is not clear that the Respondent threw her on the sofa at that point or that the incident lasted two minutes but [REDACTED] clearly stated that he choked her so hard she could not breathe and that he got scared, because as she put it, she was "coughing."

As noted previously there is very solid corroboration of this allegation in Valentine's testimony. The existence of the red marks along with her claim that she was "coughing" or choking indicates that she was in substantial pain, an element of assault in the third degree.

The Respondent is found Guilty of Specification No 2

Specification No 3

This specification alleges that after the Respondent struck and choked [REDACTED], as she tried to call 9-1-1, the Respondent grabbed her cell phone without permission or authority and broke it, causing it to become inoperable.

There are very interesting issues of corroboration regarding this allegation. Valentine testified that after she saw [REDACTED] in the late afternoon of August 31, 2008 she tried to contact her. She was unable to do so until two days later, on Monday, when

she called her at work [REDACTED] explained to her that the Respondent had broken her cell phone. The fact that Valentine could not reach [REDACTED] is corroboration, along with [REDACTED]'s statement, that the Respondent broke her cell phone. The problem is that Valentine's testimony again has a time problem. Her testimony was that "once they got back home they got into a verbal conflict, and this escalated into both of them hitting each other and physically, having physical, you know fights."

What Valentine seems to be saying is that the fight, in which the phone was broken, occurred after the barbecue, on the evening of August 31, 2008. The Department is alleging that the phone was broken during the physical altercation that occurred very early that morning.

Neither the Respondent nor [REDACTED] describe any fight as having occurred on the evening of August 31, 2008. They both do describe a fight in the early morning hours. It would be easy to conclude that Valentine simply misunderstood the time in which the fight occurred. However, there is another problem. The Respondent gave testimony that on the morning of August 31, 2008, when he went to work, he was contemplating reporting the firearm discharge. This would have been somewhere around 7:00 a.m. He said he called [REDACTED] to concoct a story about how the gun went off accidentally. He also testified that he made that call to [REDACTED] on her cell phone.

Of course it could be argued that the Respondent's claim to have called her on the cell phone that morning was self-serving but if he did not call her on the cell phone, what phone did he use? This Court, in listening to the tape (DX 1A), believed it heard [REDACTED] say there was a telephone in the house. The transcription of that tape, however, reflects dialogue in which [REDACTED] said there was, at that time, no house

phone (see DX 1B, page 15) This is one of the less audible portions of the tape and thus Court is not prepared to say that the transcript is incorrect

In sum, the evidence about the cell phone and how it got damaged is conflicted and too insubstantial to provide corroboration of the allegation that the Respondent destroyed the cell phone in the very early hours of that day, to prevent [REDACTED] from calling 911 The Respondent is found Not Guilty of Specification No 3

Specification No 4

This specification alleges that the Respondent having engaged in a physical dispute with [REDACTED] failed to safeguard his firearm by pulling said firearm from a holster at his waist, and did struggle with [REDACTED], causing the firearm to discharge one round, and did yell at said individual, "I don't care! I'm going to kill you!" causing [REDACTED] to fear for her physical safety

This specification charges many things It lists two sections of the Patrol Guide and three sections of the Penal Law that the Respondent allegedly violated with this conduct The three Penal Law sections are reckless endangerment in the first degree, prohibited use of weapons, and menacing in the second degree

One of the Patrol Guide sections relates to the Respondent's alleged failure to safeguard his weapon (the other is the general "conduct prejudicial" section) As will be seen later in this decision, the Respondent admitted to failing to safeguard his weapon by leaving it out in the open on a counter Indeed, it could be argued that the fact that his weapon was discharged, no matter who pulled the trigger, constituted a failure to safeguard the weapon, but that is not what is charged here By its own terms and

language, this specification is about the Respondent's alleged conduct in drawing the weapon from its holster and firing it while threatening [REDACTED]

As noted previously, there is no corroboration of the Department's claim and as a result there is insufficient evidence to establish that the Respondent and not [REDACTED] fired the weapon. The Respondent must be found Not Guilty of this specification.

Specification No 5

In this specification, it is alleged that the Respondent after having engaged in a physical dispute with [REDACTED] pulled her hands behind her back and handcuffed her, pushed her onto a sofa, and kept her restrained on the sofa for a period of approximately two hours, pushing her down and tightening said handcuffs when she attempted to get up and leave.

There is no doubt that during the investigative interview of October 26, 2008 [REDACTED] stated that she was handcuffed. Listening to the tape of that interview, it is not clear how long she was on the sofa before she was moved to the bedroom but she certainly did claim to be handcuffed. Again this is uncorroborated. [REDACTED] claims the handcuffs left marks that lasted for three days. Valentine, who saw her the next day at the barbecue, did not testify about such marks. Without evidence of marks left by handcuffs or any other independent evidence to corroborate the claim, there is insufficient evidence to establish that [REDACTED] was handcuffed. The Respondent must be found Not Guilty of Specification No 5.

Specification No. 6

This Specification alleges that having been involved in an unusual occurrence, a physical dispute with [REDACTED] which resulted in a discharge of the Respondent's firearm, he failed to notify the patrol supervisor, precinct of occurrence, or to safeguard the scene, as required

There is no question that the Respondent's firearm was discharged during the dispute between the Respondent and [REDACTED]. The Respondent had an obligation to report that event immediately, which he did not do. In fact he never reported the discharge, [REDACTED] did, about 55 days later, while making another complaint about the Respondent to the local precinct. The Respondent is found Guilty of this specification.

Specification No. 7

This specification alleges that on October 23, 2008, after the Respondent engaged in a dispute with [REDACTED] he forcibly pulled her out of her bed and forced her to sleep in another room. It also charges that he wrongfully took said individual's keys to the apartment.

Counsel for the Respondent has argued that while this specification may charge boorish behavior it does not charge conduct which rises to the level of misconduct.

It is unnecessary to address this issue. The allegation is unsupported hearsay and the Respondent must be found Not Guilty of Specification No. 7.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v Board of Education*, 34 N Y 2d 222 (1974)

The Respondent was appointed to the Department on July 10, 2006 Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum

Perhaps the best way to approach the issue of penalty in this case is to first look at what the Respondent said about the incident and his conduct The Respondent acknowledges that his gun was discharged in the course of a domestic dispute in his home His claim is that he left his loaded and unholstered firearm on a table in the apartment, which is how, he claims, [REDACTED] was able to take possession of and fire this weapon

He also acknowledges that after the shooting he failed to report it as he was obligated to do [REDACTED], it should be remembered, claimed that in the moments after the shooting the Respondent broke her cell phone to prevent her from calling 911 and then handcuffed her and held her captive apparently to further insure that she did not report the shooting.

Had the Respondent reported the shooting promptly these very serious allegations could never have been made His conduct in failing to immediately report the incident therefore resulted in extremely serious allegations that can never be fully proven or disproven

His failure to promptly report also prevented an effective investigation For instance the Respondent claims that [REDACTED] was intoxicated She denied that This

matter could have been settled had the shooting been reported immediately as it should have been. Additionally, a prompt investigation and examination of the untouched and fresh crime scene might have revealed or helped reveal who fired the weapon.

The problems with the Respondent's failure to promptly report the matter do not stop there. The Respondent acknowledges that he took out a police scanner and listened to see if anyone reported that a shot was fired. This changes the conduct from a mere failure to report to an intentional act of deception.

If there is any doubt that the Respondent intended to deceive this Department and possibly the criminal justice system, one has only to look at what the Respondent said about the next day. He claimed that he was considering reporting the matter and he went so far as to call [REDACTED]. In that conversation, the Respondent admits he provided her with a false story of how the gun went off accidentally while he was in the shower.

This false report was never made but without a doubt the Respondent contemplated it and took a significant step forward with that plan.

All of these acts, which the Respondent admits to, raise significant doubts about his character and integrity. Moreover, it merits noting, this incident occurred just over two years after his appointment, so his tenure on the job is very short. The incident demonstrates that he is not well suited for a long term career in this Department. For the conduct which the Respondent admits, in regard to the weapon discharge, the penalty should be dismissal.

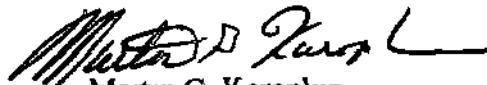
Such a penalty would be consistent with Department precedent, see Disciplinary Case No. 71908/97, fourteen year officer with one prior disciplinary conviction dismissed from the Department for wrongfully discharging his service weapon, failing to request a

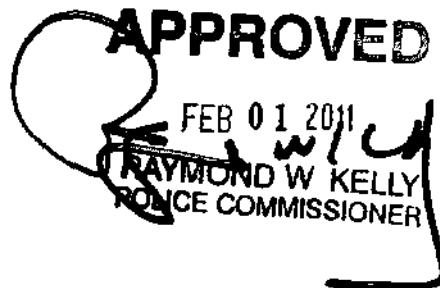
patrol supervisor or notify the desk officer, confirmed, Gonzalez v. Safir, 273 AD 2d 140, see also, Disciplinary Case No. 72552/97 and Disciplinary Case No. 74419/99, ten year member with no prior disciplinary record is dismissed for failing to safeguard his firearm, failing to notify the Department that his firearm had discharged and was then lost or stolen and falsely reporting that the gun was stolen from his car Co-respondent is also dismissed for failing to alert the Department that respondent's weapon had discharged, impeding the investigation by recovering spent shell casings and lying about his role in the cover-up In these cases, the police commissioner set aside the dismissal and allowed the respondents to file for vested interest pension Additionally, see Disciplinary Case No. 83247/07 in which an eight year member, with no disciplinary record forfeited all accrued time/leave balances, was placed on dismissal probation and required to file for vested interest pension The respondent failed to deliver a firearms acquisition form to the desk officer at his command, accidentally discharged a round from his revolver and failed to report that fact for a period of over 20 months

In this case there are additional charges for which the Respondent has been found guilty The finding that the Respondent choked [REDACTED] involves serious violent misconduct It raises questions about his temperament to serve in this Department The finding also casts doubt on the truthfulness of his testimony about the incident, again raising issues of integrity Even the very minor violation involving the use of a color copy of his Department Identification Card as a parking plaque demonstrates a lack of respect for Department rules and policies

For all of the above reasons, it is recommended that the Respondent be
DISMISSED from the New York City Police Department

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

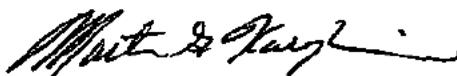


POLICE DEPARTMENT
CITY OF NEW YORK

From Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
 POLICE OFFICER JAVIER MONTALVO
 TAX REGISTRY NO 942230
 DISCIPLINARY CASE NO 84703/08 & 84721/08

In 2008, the Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2009. In his four years of service, [REDACTED] He has no prior formal disciplinary record.

For your consideration



Martin G. Karopkin
Deputy Commissioner – Trials